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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAVIER RAFAEL SOTELO, Appellant.	2 CA-CR 2007-0226 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200501193

Honorable Joseph R. Georgini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Appellant Javier Sotelo appeals his convictions of two counts of sexual assault and one count of aggravated assault. He contends the trial court erred in admitting into evidence video recordings of his and the victim's interviews with investigating officers, denying his motion for mistrial based on prosecutorial misconduct, and imposing consecutive sentences for his sexual assault convictions. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See State v. Hamblin*, 217 Ariz. 481, ¶ 2, 176 P.3d 49, 50 (App. 2008). On the evening of June 23, 2005, Sotelo picked up R. at her home to take her "[t]o go to a friend's house." Sotelo was admittedly "high" when he picked up R. While at the friend's house, Sotelo drank beer and smoked marijuana. R. and Sotelo then went to Sotelo's cousin's house, where Sotelo continued "drinking and smoking weed and [smoked] meth." In the early morning of June 24, 2005, R. went with Sotelo to his sister's home. After secluding themselves in a bedroom, Sotelo and R. began consensual kissing and petting. Sotelo then told R. he was "f—d up" and "started getting . . . more . . . aggressive." Sotelo attempted to remove R.'s shorts and underwear. R. repeatedly told Sotelo to stop and tried to push him away. Sotelo physically restrained R. and inserted his penis into her vagina. When R. again pushed Sotelo, told him to stop, and struggled to move away, he inserted his penis into her anus. R. tried to flee, and Sotelo grabbed her by her hair, threw her back onto the bed, called

her a "f—g b—," and punched her face. R. ran out of the bedroom and to her aunt's house, where her mother later called law enforcement authorities.

¶3 A forensic exam at the Pinal County Attorney's Office Family Advocacy Center revealed a bruise on the right side of R.'s face, bruises on her arms, an abrasion on her hand, bruises on her legs, and a bruising and tearing of her anal tissue indicative of blunt force trauma. Forensic analysis also found feces on Sotelo's penis and semen on R.'s underwear.

¶4 A grand jury charged Sotelo with three counts of sexual assault and one count of aggravated assault. After a seven-day trial, the jury acquitted Sotelo of one of the sexual assault charges, but found him guilty of the remaining charges. The trial court sentenced Sotelo to consecutive, presumptive, seven-year prison terms for each sexual assault conviction. It also sentenced him to a presumptive, one-year term of imprisonment for the aggravated assault, to be served concurrently with the sexual assault convictions. This appeal followed.

Discussion

Video recording of Sotelo's police interview

¶5 Before trial, Sotelo moved to preclude the state from playing a video recording of the interview he gave Casa Grande Police Department Detective Amy DeLeon the morning after the incident, arguing it was inadmissible pursuant to Rule 403, Ariz. R. Evid. He asserted that, because he had used foul language and was hostile toward DeLeon during

the interview, the video was unduly prejudicial. The court admitted the video and played it for the jury over Sotelo's objection. Sotelo did not testify at trial.

¶6 In the interview, Sotelo admitted having had vaginal sex with R., but claimed it was consensual. When DeLeon informed Sotelo that R. claimed they had had anal sex as well, Sotelo vehemently denied it, repeatedly calling R. a "f—ing snake." He also admitted, however, that R. ran out of the house after the incident. Sotelo behaved in a hostile manner during the interview and appeared intoxicated.

¶7 Sotelo contends the trial court erred in admitting into evidence the video recording of his interview with DeLeon, arguing its admission violated Rules 404(b) and 403, Ariz. R. Evid. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). But, because Sotelo did not raise the Rule 404(b) objection to the trial court, we review that portion of his argument only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Salazar*, 216 Ariz. 316, ¶ 11, 166 P.3d 107, 110 (App. 2007). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To obtain relief under the fundamental error standard of review, [Sotelo] must first prove error." *Id.* ¶ 23.

¶8 Rule 404(b) provides, in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As the state notes, the video was not evidence of "another crime, wrong, or act" but, rather, was evidence of the crime with which Sotelo was charged and for which he was tried. Contrary to Sotelo's suggestion, an interview regarding the charged crime is not "another act" within the meaning of Rule 404(b). That rule, therefore, is inapposite.[1]

¶9 Under Rule 403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the potential for unfair prejudice." *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). "[N]ot all harmful evidence is unfairly prejudicial." *Id*. Unfair prejudice occurs only when "'the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *Id.* at 599-600, 944 P.2d at 1213-14, *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Sotelo contends the video lacked "any probative value" and was "highly prejudicial" because his "attitude and demeanor in his police interview . . . and his use of profanity . . . secure[d] a conviction based on emotion, sympathy or horror." The video,

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[1]Because we have determined that Rule 404(b) is inapplicable here, we address neither the state's alternative argument that the video was admissible under that rule because it evinced Sotelo's "state of mind," nor Sotelo's assertion that the state had waived that argument.

however, was probative because, as the state asserted below, in it Sotelo described his version of events, admitted R. had run out of the room, demonstrated his aggressive nature and disrespectful attitude toward R., and, consistent with R.'s testimony, appeared intoxicated, all of which allowed the jury to assess his credibility. *See State v. Cañez*, 202 Ariz. 133, ¶¶ 60-61, 42 P.3d 564, 584 (2002) (audiotape statement showing defendant's "cocky, nonchalant attitude" aided jury in assessing his credibility and admissible under Rule 403); *State v. Fulminante*, 193 Ariz. 485, ¶ 60, 975 P.2d 75, 93 (1999) (admission of defendant's statement did not violate Rule 403 when used to establish his hostile relationship with victim). Although the video may have prejudiced Sotelo, all evidence tending to show a defendant's guilt is prejudicial and we cannot say the video of his interview with DeLeon was unfairly so. *Cf. Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence against defendant meant to be prejudicial; federal Rule 403 designed to screen out only unfair prejudice).

¶10 Last, in passing, Sotelo asserts the state violated the trial court's order precluding evidence of his gang activity by failing to redact a portion of the video in which Sotelo refers to the West Side Crips. Because he does not develop this argument in any meaningful way, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

Video recording of R.'s police interview

¶11 Asserting Sotelo's cross-examination of R. "put her credibility in issue on just about every aspect of the disclosure," the state, pursuant to Rules 801(d)(1)(B) and 106, Ariz. R. Evid., requested the trial court permit it to play a video recording of R.'s interview with DeLeon. Sotelo objected, arguing there was not "any relevance in showing the video" and that doing so "would provoke an unwarranted emotional response that is prejudicial." The court admitted the video, which the state played for the jury later that day, under "both subsections as noted for the record by the State."

¶12 Sotelo asserts the trial court erred in admitting the video recording of R's interview with DeLeon. He contends the video was not admissible under Rules 403, 801(d)(1)(B) or 106 and, relying on *Crawford v. Washington*, 541 U.S. 36 (2004), argues the video's admission violated his confrontation rights. Generally, we review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874. However, we review challenges to the admissibility of evidence under the Confrontation Clause de novo. *State v. King*, 213 Ariz. 632, ¶ 15, 146 P.3d 1274, 1278 (App. 2006). Because Sotelo did not object on these grounds below,[2] we only review his claims for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d

[2]Although Sotelo's objection below that the video was unfairly prejudicial would appear to implicate Rule 403, his argument on appeal under that rule is not that the video was prejudicial but, rather, that it was cumulative. *See Salazar*, 216 Ariz. 316, ¶ 11, 166 P.3d at 110 ("Defendant's failure to object on the basis he seeks appellate relief means that we review only for fundamental error.").

at 607. "To prevail under this standard of review, [Sotelo] must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶13 Assuming, without deciding, the trial court erred in admitting the video recording and that the error was fundamental, Sotelo has not met his burden under fundamental error review because he has failed to show how any error prejudiced him. "To show prejudice, [Sotelo was required to] show that a reasonable jury, absent any error in admitting the [evidence] could have reached a different result." *Salazar*, 216 Ariz. 316, ¶ 12, 166 P.3d at 110; *see Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. R. testified Sotelo was drunk and high when, despite her repeated objections and attempts to stop him, he forcibly had vaginal and anal intercourse with her, pulled her hair, and hit her. In his interview with DeLeon, Sotelo admitted having vaginal intercourse with R., asserting only that it was consensual. Sotelo, however, admitted that, after the incident, R. ran out of the room upset. DeLeon testified, and the video of his interview indicates, Sotelo was still impaired during the interview. R.'s mother testified that, when she saw Sotelo shortly after the assaults, he was "real jittery" and referring to R. as a "b—" and a "wh—." Both R.'s aunt and mother testified that, when R. had arrived at her aunt's home immediately after the assault, she was extremely emotional and upset. R.'s mother also testified R. then told her Sotelo had raped her. DeLeon testified that, when she interviewed R., R. complained of genital pain and had a bruise on the side of her face where she said Sotelo had hit her. As we previously noted, forensic exams revealed bruising on R.'s legs and arms, where she said Sotelo had physically

restrained her, bruising and abrasions on her anus indicative of blunt force trauma, and feces on Sotelo's penis.

¶14 As we also noted above, Sotelo concedes that the video recording was cumulative to other evidence admitted at trial. Even absent the video recording of R.'s interview with DeLeon, the evidence of Sotelo's guilt was overwhelming. In light of the significant evidence against him, Sotelo has failed to show how the video recording's admission, even if fundamentally erroneous, prejudiced him. *See State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice where "[o]verwhelming evidence in the record support[ed] the jury's verdict.").

Prosecutorial misconduct

¶15 Sotelo next contends "[n]umerous acts of prosecutorial misconduct pervaded the trial resulting in the denial of [his] constitutional right[] to due process." *See* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 24. Prosecutorial misconduct is conduct that "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

¶16 In reviewing Sotelo's claim, we first evaluate "each alleged incident to determine if error occurred." *State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006). If Sotelo objected to the alleged misconduct on that basis at trial and if misconduct indeed occurred, we will reverse unless "we can find beyond a reasonable doubt that it did not contribute to or affect the verdict." *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192; *see State v. Morris*, 215 Ariz. 324, ¶ 47, 160 P.3d 203, 214 (2007). With respect to any alleged incident to which Sotelo did not object on grounds of prosecutorial misconduct, however, we review only for fundamental, prejudicial error. *See Morris*, 215 Ariz. 324, ¶ 47, 160 P.3d at 214; *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And, to obtain relief under this standard of review, Sotelo "must first prove error." *Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

¶17 Even if an incident of misconduct "by itself does not warrant reversal, [it] may nonetheless contribute to a finding of persistent and pervasive misconduct . . . if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant.'" *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403, *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192 (citation omitted). We therefore review the incidents at issue for error and to determine if any of them "should count toward [Sotelo's] prosecutorial misconduct claim." *Id*. Finally, if any "incidents contributing to a finding of misconduct are identified, we must evaluate their cumulative effect on the trial." *Id*.

¶18 Sotelo first asserts the prosecutor in his opening statement improperly referred to Sotelo's father—a witness for the defense—as "an admitted gang member, admitted alcoholic and admitted meth user and abuser." The prosecutor referred to Sotelo's father's girlfriend as a "transient." Sotelo also argues that, after the trial court had sua sponte instructed the prosecutor not to elicit testimony regarding gangs, the prosecutor improperly elicited testimony from R. that Sotelo "was yelling West side" while outside his sister's home before the assaults. Because Sotelo did not object below, we review only for fundamental, prejudicial error. *See Morris*, 215 Ariz. 324, ¶ 47, 160 P.3d at 214.

¶19 We note Sotelo cites no authority to support his assertion that those incidents, viewed in context, were improper or otherwise constituted error. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Burdick*, 211 Ariz. 583, n.4, 125 P.3d at 1042 n.4; *see also Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party."). Even assuming the prosecutor's opening statements were improper or otherwise impermissible, the record does not reflect any intentional misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. Nor does the record suggest either that comment or R.'s testimony unduly infected the trial. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. The trial court instructed the jury to "[d]etermine the facts only from the evidence presented in court" and that "[w]hat the lawyers said [in their opening and closing statements] is not evidence." We presume the jury followed these instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996);

see also State v. Moody, 208 Ariz. 424, ¶¶ 151-52, 94 P.3d 1119, 1155 (2004) (prosecutor's improper remarks do not require reversal unless jury probably influenced by them). And, as Sotelo admitted at trial, it was unlikely that "the jury caught or [would] necessarily be able to place [R.'s testimony that Sotelo had yelled 'West side' into] any context."

¶20 Sotelo, moreover, does not argue on appeal that the prosecutor's statements to which he did not object constituted fundamental error or that he was prejudiced by them. He, therefore, has failed to meet his burden under this standard. *See Moody*, 208 Ariz. 424, ¶ 165, 94 P.3d at 1157 (appellant who failed to object at trial also failed to meet burden of demonstrating fundamental error when he developed no appellate argument that error "rendered it impossible for him to have received a fair trial").

¶21 Sotelo next asserts prosecutorial misconduct occurred when, while questioning Sotelo's father, the prosecutor asked Sotelo's father: "You didn't say [you were awake the night of the assault to investigating officers] because that's not the truth, is it?" Sotelo also contends the prosecutor improperly commented on his father's girlfriend when he asked his father if, after Sotelo and R. had arrived at Sotelo's sister's house, he "went back to bed with V[.], the homeless meth addict." Although Sotelo objected to these questions at trial, he did not do so on the basis of prosecutorial misconduct. We therefore review these arguments only for fundamental, prejudicial error. *See Morris*, 215 Ariz. 324, ¶ 47, 160 P.3d at 214; *see also State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003) (objection on different ground

in trial court "did not preserve the issue of prosecutorial misconduct" and, therefore, claim reviewed only for fundamental error).

¶22 Again, Sotelo cites no authority supporting his assertion that these questions were improper. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Burdick*, 211 Ariz. 583, n.4, 125 P.3d at 1042 n.4; *see also Ace Auto. Prods., Inc.*, 156 Ariz. at 143, 750 P.2d at 901. Even assuming the questions were improper, a prosecutor's improper inquiry may be cured when, as here, the court sustains the objection to it and admonishes the jury to ignore the question. *See Moody*, 208 Ariz. 424, ¶¶ 151-52, 94 P.3d at 1155. The trial court sustained Sotelo's objection to the first question and struck the second question after admonishing the prosecutor to "take a deep breath and . . . collect [him]self" because "the pace and intensity of [the] questioning [was] heightening . . . [and] that was an inappropriate comment." Additionally, the court instructed the jurors that "[i]f the court sustained an objection to a lawyer's question, you must disregard it and any answer given. Any testimony stricken from the court record must not be considered." We presume the jury followed the instructions the trial court gave it. *See LeBlanc*, 186 Ariz. at 439, 924 P.2d at 443. We cannot say the prosecutor's questions constitute error, let alone fundamental, prejudicial error, in view of the trial court's rulings on and handling of Sotelo's objections to the questions. *See Moody*, 208 Ariz. 424, ¶¶ 151-52, 94 P.3d at 1155.

¶23 In the sole instance where Sotelo specifically raised a claim of prosecutorial misconduct below, he moved for a mistrial based on that ground during the state's closing

argument because the prosecutor had presented and discussed a PowerPoint slide stating Sotelo's father was a "self-admitted gang banger, alcoholic, and meth user." The trial court denied Sotelo's motion for mistrial but, because no evidence had been presented establishing Sotelo's father was in a gang, instructed the prosecution to correct that statement to the jury. After the prosecutor retracted that portion of his statement, noted there was no evidence the father was a gang member, and apologized to the jury, the court instructed the jury to "disregard" the gang reference and give it "no consideration at all in [its] decisions."

¶24 "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006). "Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). It is permissible in closing argument for counsel "to comment on the credibility of a witness where [the] remarks are based on the facts in evidence." *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976). A prosecutor's remarks are improper, however, if they "call to the attention of the jur[ors] matters that they would not be justified in considering in order to arrive at their verdict." *State v. Turrentine*, 152 Ariz. 61, 67, 730 P.2d 238, 244 (App. 1986).

¶25 Sotelo suggests the prosecutor's entire statement was improper but, again, fails to develop the point and cites no authority supporting it. *See* Ariz. R. Crim. P.

31.13(c)(1)(vi); *Burdick*, 211 Ariz. 583, n.4, 125 P.3d at 1042 n.4. The record, moreover, indicates Sotelo's father, who was at Sotelo's sister's home the night of the assaults and testified he did not hear any commotion that evening, admitted: regularly using methamphetamine and alcohol; drinking on the night of the assaults; having used methamphetamine the day before; and being asleep at the time of the assaults.[3] The state properly relied on this testimony to question the father's credibility. *See Williams*, 113 Ariz. at 444, 556 P.2d at 319. As the trial court noted, however, because no evidence of the father's gang involvement had been presented at trial, the prosecutor's reference to his gang involvement was improper. *See Turrentine*, 152 Ariz. at 67, 730 P.2d at 244; *see also State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996) (noting argument clearly improper when it refers to matters not in evidence).

¶26 Nonetheless, the record as a whole does not reflect any intentional misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27; *Pool*, 139 Ariz. at 109, 677 P.2d at 272. Although the court previously had instructed the prosecutor not to refer to Sotelo's or his family's gang involvement during trial or closing arguments, the prosecutor stated, and Sotelo did not contest, he had prepared the slide prior to the court's rulings and his failure to delete the gang reference was accidental. Nor, in light of the court's instructions to the jury, can we say the impropriety unduly infected the trial. *See Hughes*, 193 Ariz. 72, ¶ 26,

[3]Sotelo does not assert this testimony was improperly admitted.

969 P.2d at 1191; *Moody*, 208 Ariz. 424, ¶¶ 151-52, 94 P.3d at 1155; *LeBlanc*, 186 Ariz. at 439, 924 P.2d at 443. In sum, the prosecutor's closing argument did not constitute error.

¶27 We now turn to Sotelo's argument that "the prosecutor's repeated acts of misconduct . . . combined to deny [him] his constitutional rights to a fair trial" and, therefore, warrant reversal. *See Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403. As we have noted, even if an instance of misconduct "by itself does not warrant reversal, [it] may nonetheless contribute to a finding of persistent and pervasive misconduct," if the cumulative effect of several incidents of misconduct shows the prosecutor "intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant.'" *Id., quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192. We, however, have found no discrete and particular instances of clear prosecutorial misconduct. Absent any findings of misconduct, the cumulative error concept does not apply. *See State v. Bocharski*, 218 Ariz. 476, ¶ 75, 189 P.3d 403, 419 (2008); *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

Consecutive sentences

¶28 At the sentencing hearing, the state recommended the trial court impose consecutive sentences for Sotelo's sexual assault convictions. The state further asserted that, because Sotelo had been convicted of two sexual assaults, A.R.S. § 13-1406(C) mandated consecutive sentences. Pursuant to § 13-1406(C): "The sentence imposed on a person for a sexual assault shall be consecutive to any other sexual assault sentence imposed on the person at any time." Sotelo objected that, despite § 13-1406(C), consecutive sentences were

improper because the assaults were "one ongoing thing." Over Sotelo's objection, and relying on § 13-1406(C), the court sentenced Sotelo to two, consecutive, seven-year prison terms for his sexual assault convictions.

¶29 Sotelo argues the trial court "incorrectly interpreted the law" when it imposed consecutive sentences for his sexual assault convictions. As we understand his argument, Sotelo contends imposing consecutive sentences pursuant to § 13-1406(C) violated A.R.S. § 13-116, the statutory prohibition against double punishment, because "under the circumstances of this case," his sexual assaults do not "truly constitute two separate and distinct sexual assault offenses." "Even though there were two separate and distinct entries," Sotelo reasons, "they were part of one continuous act [because] [t]hey were not separated by any appreciable length of time."

¶30 We review de novo whether consecutive sentences are permissible under § 13-116. *See State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002). Section 13-116 states: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Sotelo was convicted of multiple violations of § 13-1406, which prohibits "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." As the state notes, § 13-116 is inapplicable here because Sotelo was charged with multiple acts in violation of the same statute, not an act in violation of different statutes. *See State v. Griffin*, 148 Ariz. 82, 85, 713 P.2d 283, 286

(1986) (no violation of § 13-116 when defendant "charged with and convicted of four counts of the same offense: sexual assault"); *State v. Williams*, 182 Ariz. 548, 562, 898 P.2d 497, 511 (App. 1995) (where "defendant violated the same statute . . . multiple times" in committing sexual assaults, § 13-116 inapplicable); *see also State v. Henley*, 141 Ariz. 465, 467, 687 P.2d 1220, 1222 (1984) (when "both counts are punishable under the same sections of the law," § 13-116 does not bar consecutive sentences); *State v. Brown*, 217 Ariz. 617, n.4, 177 P.3d 878, 882 n.4 (App. 2008) (same). And, even were § 13-116 applicable, Sotelo's consecutive sentences would be permissible because separate evidence supported each sexual assault, Sotelo could have committed each sexual assault without also committing the other, and, as evidenced by R.'s injuries, the second sexual assault exposed R. to an additional risk of harm beyond that inherent in the first. *See Griffin*, 148 Ariz. at 85-86, 713 P.2d at 286-87; *see also State v. Gordon*, 161 Ariz. 308, 314-15, 778 P.2d 1204, 1210-11 (1989).

¶31 Last, Sotelo asserts in passing that the consecutive sentences violate his constitutional rights against cruel and unusual punishment. Sotelo, however, has cited no authority supporting this argument or developed it in any meaningful way. We, therefore, do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Burdick*, 211 Ariz. 583, n.4, 125 P.3d at 1042 n.4.

Disposition

¶32 For the foregoing reasons, we affirm Sotelo's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge